IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	2 CA-CR 2006-0337
Appellee,	)	DEPARTMENT B
	)	
v.	)	MEMORANDUM DECISION
	)	Not for Publication
ROBERT JOHN MAURER,	)	Rule 111, Rules of
	)	the Supreme Court
Appellant.	)	
	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20044075

Honorable Hector E. Campoy, Judge

AFFIRMED IN PART AND VACATED IN PART

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V Á S Q U E Z, Judge.

¶1 A jury found Robert John Maurer guilty of one count each of manufacturing a dangerous drug, possessing equipment for the purpose of manufacturing a dangerous drug, possessing drug paraphernalia, and endangerment. The trial court sentenced him to concurrent, mitigated terms of imprisonment, the longest of which was six years. On appeal, Maurer argues: 1) possession of equipment and chemicals for manufacturing a dangerous drug is a lesser-included offense of the manufacture of a dangerous drug, and his convictions for both violate double jeopardy principles; 2) receipts are not drug paraphernalia, and therefore the indictment alleging possession of receipts as drug paraphernalia could not be amended during trial to include scales without his personal consent; 3) there was insufficient evidence to support the endangerment conviction; and 4) the trial court did not properly instruct the jury on reasonable doubt. For the reasons that follow, we affirm in part but vacate Maurer's convictions for possessing drug paraphernalia and equipment for manufacturing a dangerous drug.

Facts and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the jury's verdict. *State v. Miles*, 211 Ariz. 475, ¶ 2, 123 P.3d 669, 670 (App. 2005). In December 2004, Tucson police officer Edward Boyen performed a welfare check at an address on West Alturas Street in Tucson. As Boyen approached the property, he noticed a man later identified as Maurer walking out of a shed in the yard. Boyen asked Maurer who else was present on the property and then asked to speak with C., the person on whose welfare Boyen

was checking. Boyen and C. spoke privately while Maurer retrieved a cell phone at Boyen's request. Boyen then entered the property with Maurer's permission.

¶3 Boyen noticed that Maurer's hands were stained red and, as he walked through the yard, Boyen saw what he believed to be a methamphetamine laboratory in the shed.[1] He directed everyone on the property and other properties near the shed to move to the other side of the street and told his sergeant what he had found. Boyen arrested and searched Maurer, finding several receipts in his pocket. Other officers arrived and dismantled the "meth lab."

¶4 Maurer was charged with one count of manufacturing the dangerous drug methamphetamine, one count of possessing equipment for the purpose of manufacturing a dangerous drug, two counts of vulnerable-adult abuse, one count of possessing drug paraphernalia, and one count of endangerment. On the first day of trial, the state dismissed with prejudice the charges of vulnerable-adult abuse. A jury found Maurer guilty of the remaining four counts, and the trial court sentenced him to concurrent, mitigated prison terms of six years for the manufacture of a dangerous drug, 4.5 years for possessing equipment for manufacturing a dangerous drug, one year for possessing drug paraphernalia, and 1.5 years for endangerment. This appeal followed.

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[1]Maurer testified that red phosphorous, which is used in the manufacture of methamphetamine, spilled on his hands as he was attempting to clean up the shed.

Discussion

I. Lesser-included charge

¶5 Maurer first argues that his convictions for both the manufacture of a dangerous drug and possessing equipment for the purpose of manufacturing a dangerous drug violate federal and state double jeopardy principles because possessing equipment for the purpose of making methamphetamine is a lesser-included offense of manufacturing methamphetamine. He relies on *State v. Welch*, 198 Ariz. 554, 12 P.3d 229 (App. 2000), as authority for this proposition. The state acknowledges that *Welch* did in fact hold that possession of equipment for manufacturing methamphetamine is a lesser-included offense of manufacturing methamphetamine. However, it argues *Welch* was wrongly decided and urges us not to follow it. We find *Welch* controlling.

¶6 Double jeopardy principles prohibit multiple punishments for the same offense. *Id.* ¶ 6; *Quinton v. Superior Court*, 168 Ariz. 545, 550, 815 P.2d 914, 919 (App. 1991). Thus, when a defendant has already been convicted and punished for an offense, the protection against double jeopardy precludes separate punishment for a lesser-included offense. *Welch*, 198 Ariz. 554, ¶ 6, 12 P.3d at 231; *see also Brown v. Ohio*, 432 U.S. 161, 168-69 (1977).

> An offense is a lesser-included offense if it is composed solely of some, but not all, of the elements of the greater offense so that it is impossible to commit the greater offense without also committing the lesser. Put another way, the greater offense contains each element of the lesser offense, plus one or more elements not found in the lesser.

State v. Cisneroz, 190 Ariz. 315, 317, 947 P.2d 889, 891 (App. 1997) (internal citations omitted); *see also Carter v. United States*, 530 U.S. 255, 260 (2000) (applying same test to determine whether offense is lesser included). "Thus, it is not enough to satisfy the test that the greater offense cannot be committed without necessarily committing the lesser. It must also be shown that the lesser cannot be committed without always satisfying the corresponding elements of the greater." *In re Victoria K.*, 198 Ariz. 527, ¶ 17, 11 P.3d 1066, 1070 (App. 2000).

¶7 Under A.R.S. § 13-3407(A)(3), a person shall not knowingly "possess equipment or chemicals, or both, for the purpose of manufacturing a dangerous drug"; under subsection (4), a person shall not knowingly "manufacture a dangerous drug." The court in *Welch* examined the definition of possession and noted that it includes physical possession or the exercise of dominion and control over an item of property, even if the item was not in the defendant's physical possession. *Welch*, 198 Ariz. 554, ¶ 11, 12 P.3d at 232; *see also* A.R.S. § 13-105(30) (defining possession); *State v. Chabolla-Hinojosa*, 192 Ariz. 360, ¶ 13, 965 P.2d 94, 97 (App. 1998) (exercise of dominion and control does not require physical possession). Based on this broad definition of possession, the court concluded that "it is impossible to manufacture methamphetamine without possessing the equipment and/or chemicals for that purpose." *Welch*, 198 Ariz. 554, ¶ 11, 12 P.3d at 232.

¶8 Relying on the dissent in *Welch*, the state argues that, because § 13-3407(A)(3), the lesser offense, requires the possession of equipment or chemicals that are not required elements of manufacture under § 13-3407(A)(4), possession of chemicals or equipment

cannot be a lesser-included offense. However, we agree with the majority that, "[w]hile the act of manufacturing methamphetamine encompasses more than the possession of the equipment and/or chemicals, the possession of such equipment and/or chemicals is the sine qua non of the manufacture of methamphetamine." *Id.*

¶9 Furthermore, "'the principle of stare decisis and the need for stability in the law . . . dictate that we consider decisions of coordinate courts as highly persuasive and binding.'" *Scappaticci v. Southwest Sav. & Loan Ass'n*, 135 Ariz. 456, 461, 662 P.2d 131, 136 (1983), *quoting Castillo v. Indus. Comm'n*, 21 Ariz. App. 465, 471, 520 P.2d 1142, 1148 (1974); *see also Curtis v. Morris*, 184 Ariz. 393, 397, 909 P.2d 460, 464 (App. 1995). We see no reason to deviate from this principle. Therefore, we conclude the possession of equipment or chemicals for the purpose of manufacturing methamphetamine is a lesser-included offense of the manufacture of methamphetamine. Thus, convicting Maurer of both offenses violated his right against double jeopardy. We therefore vacate his conviction for possessing equipment for the purpose of manufacturing methamphetamine. *See Welch*, 198 Ariz. 554, ¶ 13, 12 P.3d at 232 (vacating conviction for lesser-included offense).

II. Amendment of indictment

¶10 Next, Maurer argues reversible error occurred when the trial court permitted the state at the close of its case to amend the count in the indictment charging him with possession of drug paraphernalia. The charge in Maurer's original indictment read: "On or about the 2nd day of December, 2004, ROBERT JOHN MAURER . . . unlawfully possessed[] drug paraphernalia, to wit: receipts, in violation of A.R.S. §§ 13-3415(A) and/or

13-3415(E)(1) . . . ." At the close of its evidence, the state moved to amend that count of the indictment to include possession of a scale. Maurer's counsel understood it to be an amendment to conform to the evidence, stating, "I don't object to that because that is what the evidence was. There was a scale found. I can't object to it." The trial court granted the motion. Maurer now claims the original indictment was invalid because it failed to state a valid offense. He contends the state's addition of a scale to the indictment "actually created a valid charge for the first time," requiring his personal consent to the amendment. Thus, he argues, the court's failure to obtain his personal consent requires reversal. We agree.

¶11 Section 13-3415(A) provides, "It is unlawful to use, or to possess with intent to use, drug paraphernalia to . . . manufacture . . . a drug in violation of this chapter." As originally worded, the indictment properly alleged a crime only if receipts constitute drug paraphernalia. Section 13-3415(F)(2) defines drug paraphernalia as "all equipment, products and materials of any kind which are used, intended for use or designed for use in . . . manufacturing . . . a drug in violation of this chapter." Although receipts may be evidence of the purchase, possession, or use of drug paraphernalia, the receipts themselves are not equipment, products, or materials that can be used to manufacture a drug. Because receipts are not drug paraphernalia, they alone will not support a conviction for possession of drug paraphernalia. Consequently, that count in the original indictment failed to allege an offense. *See* Rule 13.2(a), Ariz. R. Crim. P. (indictment is "plain, concise statement of the facts sufficiently definite to inform the defendant of the offense charged"); *see also State v. Maxwell*, 103 Ariz. 478, 480, 445 P.2d 837, 839 (1968) (information sufficient where

defendant apprised of specific offense as named by statute and specific conduct alleged to have violated such statute). The original indictment was therefore void. *See State v. Andrus*, 17 Ariz. App. 70, 71, 495 P.2d 510, 511 (1972) ("If an information fails to state a public offense, . . . said information is void."); *see also State v. Smith*, 66 Ariz. 376, 379, 189 P.2d 205, 207 (1948) (court lacks jurisdiction over offense if information does not state offense).

¶12 The state does not dispute that the original indictment failed to state an offense. Instead, it argues that, because Maurer failed to object to either the original indictment or the amendment, his argument is entitled only to a fundamental error review.[2] And it further argues that, even if fundamental error occurred, Maurer cannot show prejudice because there is no indication that "he planned to defend against the charge on that basis" and because evidence of his possession of the scale was admitted during trial. But whether sufficient evidence had actually been presented at trial to prove Maurer committed an offense is irrelevant. A conviction for a charge other than the one for which the defendant was indicted "cannot be justified on the basis that there is evidence in the record to support the amended charge." *State v. Sanders*, 205 Ariz. 208, ¶ 24, 68 P.3d 434, 441 (App. 2003). Moreover, when an amendment changes the nature of the offense without the defendant's consent, prejudice is presumed, and the error is reversible per se. *Id.* ¶ 20.

¶13 The Sixth Amendment to the United States Constitution and article II, §§ 24 and 30 of the Arizona Constitution protect an accused from standing trial for an offense

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[2]To succeed on fundamental error review, the defendant must show that fundamental error occurred and that it caused him prejudice. *State v. Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d 601, 607 (2005).

without first being provided sufficiently specific notice of the nature and cause of the accusation so that the accused may prepare a defense. *Id.* ¶ 16 (Sixth Amendment); *State v. Cheramie*, 217 Ariz. 212, ¶ 8, 171 P.3d 1253, 1257 (App. 2007) (Arizona Constitution). Amending an indictment is permitted at trial to enable the indictment to conform to the evidence. Rule 13.5(b), Ariz. R. Crim. P. However, "[t]he charge may be amended only to correct mistakes of fact or remedy formal or technical defects, unless the defendant consents to the amendment." *Sanders*, 205 Ariz. 208, ¶ 18, 68 P.3d at 440. A defect is only formal or technical if the amendment correcting it "'does not operate to change the nature of the offense charged or to prejudice the defendant in any way.'" *State v. Johnson*, 198 Ariz. 245, ¶ 5, 8 P.3d 1159, 1161 (App. 2000), *quoting State v. Bruce*, 125 Ariz. 421, 423, 610 P.2d 55, 57 (1980).

¶14 An amendment changes the nature of an offense "either by proposing a change in factual allegations or a change in the legal description of the elements of the offense." *Sanders*, 205 Ariz. 208, ¶ 25, 68 P.3d at 441. An example of a change in factual allegations was presented in *State v. Singh*, 4 Ariz. App. 273, 419 P.2d 403 (1966), where the defendant was originally charged with uttering or passing a forged instrument to a specifically named person. After the state presented its case, it moved to substitute the name of a different person. *Id.* at 277, 419 P.2d at 407. Our supreme court found that, although the elements of the charged crime were the same, the substitution of a different recipient of the forged document created a separate and distinct crime. It therefore ruled the amendment was not permissible. *Id.* at 278, 419 P.2d at 408. The same is true in this case.

¶15 The original indictment failed to state an offense as a matter of law. However, by changing the factual allegations supporting the charge to include possession of a scale, the indictment was amended during trial to allege a separate, valid offense for the first time. *See* § 13-3415(F)(2). The possession of a scale and the possession of receipts are two distinct acts, particularly when, as here, the receipts were found in a different location than the scale. Furthermore, Maurer could have admitted each factual allegation in the original count and still not have been guilty of a crime. In contrast, once the charge was amended to include the scale, a specific defense to possessing the scale was required, for which Maurer was given neither prior notice nor time to prepare. The amendment alleged a wholly separate act from the one alleged in the indictment, and it charged an actual offense. Therefore, Maurer's personal consent was required for the amendment; his silence and defense counsel's consent were not enough. *State v. Sanders*, 115 Ariz. 289, 293, 564 P.2d 1256, 1260 (App. 1977) ("While the record discloses that appellant's lawyer consented to a consideration of offenses other than those charged in the indictment, we believe that this is one of those instances when it must be shown that the defendant himself consented to the amendment."). Thus, the amendment was not permissible under Rule 13.5, prejudice is presumed, and the conviction is reversible per se. *Sanders*, 205 Ariz. 208, ¶ 20, 68 P.3d at 440. And, in any event we would find the error fundamental and prejudicial. *State v. Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d 601, 607-08 (2005). We therefore vacate Maurer's conviction for possession of drug paraphernalia.

III. Sufficiency of evidence

¶16 Maurer asserts the state did not produce sufficient evidence at trial to prove endangerment. He contends that the state was required to prove someone "had actually been put at substantial risk" and that evidence of the general risk posed by "cooking" methamphetamine was insufficient.

¶17 As part of this argument, Maurer argues the jury instruction on the elements of endangerment was deficient because it did not require the jury to find that he had placed anyone in actual substantial risk of imminent death or physical injury. Because he did not object to the jury instruction below, we review this claim for fundamental error only. *Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607. Fundamental error is error that goes to the foundation of the case, takes away a right essential to the defense, and deprives the defendant of a fair trial. *Id.* To prevail on fundamental error review, Maurer must prove that fundamental error occurred and that it caused him prejudice. *Id.* ¶ 20.

¶18 The crime of endangerment requires "that the victim be placed in *actual* substantial risk of imminent death or physical injury." *State v. Doss*, 192 Ariz. 408, ¶ 7, 966 P.2d 1012, 1015 (App. 1998); *see also* A.R.S. § 13-1201(A) ("A person commits endangerment by recklessly endangering another person with a substantial risk of imminent death or physical injury."). Here, although the jury instruction defining endangerment did not contain the word "actual," it stated that the defendant's conduct must "*in fact create* a situation in which the defendant placed a person in substantial risk of imminent death." (Emphasis added). This instruction correctly stated the law and did not, as Maurer contends,

"change[] the nature of an element of the offense." *See id.* ¶ 9 ("A proper endangerment instruction would inform the jury that the charge required proof that defendant['s] . . . conduct *did* in fact create . . . a substantial risk as to each victim."). There was no error in the instruction, let alone fundamental error.

¶19 Maurer's contention that the state did not produce sufficient evidence to prove "that anyone had actually been put at substantial risk, or that the risk was imminent" is likewise without merit. At the close of the state's case, Maurer filed a motion for judgment of acquittal pursuant to Rule 20, Ariz. R. Crim. P. The trial court denied the motion, finding the state had presented substantial evidence of Maurer's guilt.

¶20 We review the trial court's denial of a Rule 20 motion for an abuse of discretion. *State v. Paris-Sheldon*, 214 Ariz. 500, ¶ 32, 154 P.3d 1046, 1056 (App. 2007). We will reverse only if there is "no substantial evidence to warrant a conviction." Rule 20; *see also State v. Mathers*, 165 Ariz. 64, 66, 796 P.2d 866, 868 (1990). "Substantial evidence is more than a mere scintilla and is such proof that 'reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt.'" *Id.* at 67, 796 P.2d at 869, *quoting State v. Jones*, 125 Ariz. 417, 419, 610 P.2d 51, 53 (1980).

¶21 As we have noted, "A person commits endangerment by recklessly endangering another person with a substantial risk of imminent death or physical injury." § 13-1201(A). Endangerment requires proof that the defendant ignored a substantial risk that his conduct would cause the imminent death of the victim and in fact created such a risk to the victim.

Doss, 192 Ariz. 408, ¶ 9, 966 P.2d at 1015. The state produced evidence of a "definite possibility" that phosphine gas, which is produced during the manufacture of methamphetamine and can result in injuries ranging from skin irritation to death, could have escaped from the shed.

¶22 Even after the "cooking" had stopped, police officers had to wait "a couple of hours" before they could safely enter to dismantle the lab. The state also elicited testimony that "actively cooking labs" are an "immediate danger" and that even "cold labs," where methamphetamine has already been cooked, are still dangerous due to the fumes produced during the cooking process. Detective Garcia, who specializes in narcotics crimes, testified that the dangerousness of this particular lab during its cooking stage was a ten on a scale of one to ten. Finally, Maurer himself testified that he knew the lab in the shed was "dangerous and could start a fire" if the hot plate were not turned off.

¶23 Together, the testimony of the officers and Maurer established that the methamphetamine lab contained dangerous gases, might have caught fire if the hot plate had not been turned off, and was at risk of exploding. From this evidence, the jury could reasonably have inferred that the level of risk created by the active cooking of methamphetamine in this lab posed an actual, substantial risk to "individuals living near" the property, as the indictment alleged. *State v. McKeon*, 201 Ariz. 571, ¶ 22, 38 P.3d 1236, 1240-41 (App. 2002) (province of jury to resolve disputed facts and inferences); *see also State v. Hall*, 204 Ariz. 442, ¶ 47, 65 P.3d 90, 101 (2003) (taken together, circumstantial evidence provided reasonable basis for inferring murder had occurred even though body was

never found). Therefore the state presented substantial evidence of Maurer's guilt, and the trial court did not abuse its discretion in denying Maurer's motion for judgment of acquittal.

IV. Reasonable doubt instruction

¶24 Finally, Maurer argues the trial court committed structural error in not instructing the jury on reasonable doubt in accordance with our supreme court's mandate in *State v. Portillo*, 182 Ariz. 592, 596, 898 P.2d 970, 974 (1995). In *Portillo*, the supreme court approved a uniform jury instruction on reasonable doubt and "instruct[ed] that in every criminal case, trial courts shall give the reasonable doubt instruction" it set forth. *Id.* Maurer now contends that, because the trial court omitted the final sentence of the *Portillo* instruction and substituted its own, the state's burden of proof was reduced, and structural error resulted. We disagree.

¶25 The *Portillo* instruction reads:

> The state has the burden of proving the defendant guilty beyond a reasonable doubt. In civil cases, it is only necessary to prove that a fact is more likely true than not or that its truth is highly probable. In criminal cases such as this, the state's proof must be more powerful than that. It must be beyond a reasonable doubt.
>
> Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him/her guilty. If, on the other hand, you think there is a real possibility that he/she is not guilty, you must give him/her the benefit of the doubt and find him/her not guilty.

Id. In this case, the trial court did not give this instruction verbatim. In addition to altering some and adding other language, it omitted the final sentence of the instruction, substituting the statement: "Otherwise, you must find the defendant not guilty."

¶26 Maurer acknowledges that *State v. Sullivan*, 205 Ariz. 285, ¶¶ 12-13, 69 P.3d 1006, 1008-10 (App. 2003), dealt with this identical substituted language, but he argues the issue whether "the particular change in the *Portillo* instruction changed it from an accurate statement of reasonable doubt to an instruction that misled the jury" was not before the court in *Sullivan*.

¶27 In *Sullivan*, Division One of this court concluded that, although it was error to deviate from the *Portillo* instruction, substituting the sentence, "Otherwise, you must find the defendant not guilty," was not structural error and, in fact, was harmless. *Sullivan*, 205 Ariz. ¶¶ 12-25, 69 P.3d at 1008-11. For the court to conclude the error was harmless, it necessarily concluded that the change in wording was not misleading and did not lower the state's burden of proof. *Id.* ¶ 21 (test for harmless error is whether verdict would have been different absent error); *see Henderson*, 210 Ariz. 561, ¶ 18, 115 P.3d at 607 (harmless error is error that did not contribute to or affect verdict). The situation presented here is identical to that in *Sullivan*, and we therefore find *Sullivan* controlling. *Scappaticci v. Southwest Sav. & Loan Ass'n*, 135 Ariz. 456, 461, 662 P.2d 131, 136 (1983) (decisions of coordinate courts highly persuasive); *Curtis v. Morris*, 184 Ariz. 393, 397, 909 P.2d 460, 464 (App. 1995) (same). The substituted sentence instructs the jury to find the defendant not guilty unless it is "firmly convinced" of the defendant's guilt and is a sufficient statement of the state's

burden of proof. *See Sullivan*, 205 Ariz. 285, ¶ 12, 69 P.3d at 1008-09; *Portillo*, 182 Ariz. at 596, 898 P.2d at 974 (using "firmly convinced" language in instruction). Thus, although the trial court erred in deviating from the wording of the *Portillo* instruction, the error was harmless.

Disposition

¶28 Maurer's convictions and sentences for endangerment and for manufacturing methamphetamine are affirmed. However, we vacate his convictions and sentences for possessing equipment for the purpose of manufacturing methamphetamine and possessing drug paraphernalia.

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GARYE L. VÁSQUEZ, Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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PHILIP G. ESPINOSA, Judge